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No. 89-1892

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

DOROTHY GONZALES,

Petitioner,

v.

NEW MEXICO EDUCATIONAL RETIREMENT
BOARD and FRANK READY, Director,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Pursuant to Rule 15.7 of the Supreme Court Rules, Petitioner respectfully files this supplemental brief. The cases discussed to which the attention of the Court is respectfully referred are: *Howlett v. Rose*, ___ U.S. ___, 110 L. Ed. 2d 332 (1990) (No. 89-5383); *Dennis v. Higgins*, 451 N.W.2d 676 (Neb. 1990), *cert. granted*, 110 S. Ct. 2559 (5/29/90) (No. 89-1555); and *Oregon State Police Officers Association v. Oregon*, 766 P.2d 408 (Or. Ct. App. 1988), *petition for cert. filed*, 58 U.S.L.W. 3727 (U.S. Apr. 11, 1990) (No. 89-1604).

I.

HOWLETT v. ROSE

On June 11, 1990, this Court ruled that the Supremacy Clause requires a state court to entertain a claim under § 1983. The Court went on to note that "[T]he Florida Court's refusal to entertain one discrete category of § 1983 claims, while the Court entertains similar state law actions against state defendants, violates the Supremacy Clause." 110 L. Ed. 2d at 353. Here, as there, the state court held that the respondent had violated mandatory, non-discretionary duties under state law, but refused to apply that judgment to Petitioner's § 1983 claim. It would appear that *Howlett, supra*, is directly in point.

II.

DENNIS v. HIGGENS

Dennis v. Higgins, supra, implies the same issue. This Court granted review on the question whether a claim arising under the Commerce Clause may be brought pursuant to 42 U.S.C. § 1983. The state did not appeal the trial court judgment that the tax was illegal. It would appear, therefore, that the only live issue is whether 42 U.S.C. §§ 1983 and 1988 may be invoked in a Commerce Clause case, where a plaintiff has already prevailed on the state law claim, but without the fee-shifting purpose of § 1988.

III.

OREGON STATE POLICE OFFICERS ASSOCIATION v. STATE OF OREGON

In *Oregon State Police Officers Association v. Oregon, supra*, the identical issue is presented to this Court. The

only difference visible to Petitioner is that the Oregon Police Officer's Association may have been able to pay plaintiff's counsel without the invocation of 42 U.S.C. § 1988, whereas in the instant case Mrs. Gonzales' vindication of her right to \$3,000 of disability benefits required a liability of over \$6,000 attorney's fee.

CONCLUSION

Intent to exclude reliance upon § 1983 as a remedy for a deprivation of a federally secured right is not lightly inferred and the burden is on the state to show by express provision, or other specific evidence, that Congress intended to foreclose such private enforcement. *Wilder v. Virginia Hospital Association*, 58 U.S.L.W. 4795 (June 12, 1990). The effect of 42 U.S.C. § 1988 is not impeded by the Eleventh Amendment. *Hutto v. Finney*, 437 U.S. 678 (1978).

Accordingly, Petitioner respectfully refers the Court to the above-mentioned cases in support of her Petition for Certiorari to reverse the exclusion of 42 U.S.C. § 1983 and § 1988 by the New Mexico Supreme Court.

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